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No. 88-280

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL F. MCCARTHY AND
HAROLD OKAHARA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Whether the acts alleged in counts 2-30 of the indictment constituted the offense of mail fraud.

2. Whether a midtrial judgment of acquittal of petitioners on the other 45 counts of the indictment, which charged mail fraud, wire fraud, and conspiracy, collaterally estops the government from trying petitioners on counts 2-30, which had been dismissed before trial at petitioners' request but were reinstated on appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A53), as amended (see Pet. App. C1-C3, E1-E3), is reported at 840 F.2d 1441.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1988. A petition for rehearing was denied on June 15, 1988 (Pet. App. F1-F2). The petition for a writ of certiorari was filed on August 15, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 7, 1985, a grand jury in the District of Hawaii indicted petitioners and three co-defendants on one count of conspiracy, in violation of 18 U.S.C. 371 (count 1); 65 counts of mail fraud, in violation of 18 U.S.C. 1341 (counts 2-66); and eight counts of wire fraud, in violation of 18 U.S.C. 1343 (counts 67-74). The district court dismissed 29 of the mail fraud counts on the ground that they failed to allege an offense. While the government's appeal from that dismissal was pending, petitioners proceeded to trial on the 45 remaining counts. At the close of the government's case, the district court entered judgments of acquittal on those 45 counts. The court of appeals subsequently reversed the dismissal of the other 29 counts and remanded for trial. Petitioners contend that the court of appeals erred in reversing the order of dismissal and that, in any event, trial of the 29 pending counts is barred by the Double Jeopardy Clause.

1. The mail fraud counts in the indictment alleged that, between December 1977 and December 1981, petitioners and their co-defendants engaged in a scheme to defraud by diverting funds collected from mortgagors on behalf of mortgage companies to their own uses, particularly to capitalize a loan company and other business ventures. More specifically, it alleged that, during the period of the scheme, co-defendant Matsukage was concurrently the president of Pacific Standard Investment and Loan, Inc. (Pacific), and the president of Real Estate Finance Corporation (REFC). Pacific was an industrial loan company authorized by state law to solicit public funds for deposit and to make loans with those funds. REFC, which shared offices with Pacific and had been owned by co-defendant Curtis J. Bernhardt between December 1977 and June 1978, was a mortgage-servicing

company that made agreements with various mortgage companies to collect monthly mortgage payments from homeowners, deposit them into trustee accounts, forward the monthly principal and interest payments to the mortgage companies that they serviced, and pay property taxes and other expenses incurred by the mortgagors when due.

At the same time, petitioners were also officials of Norfolk Investment Co., Ltd. (Norfolk), which shared offices with both Pacific and REFC. Norfolk and its associated companies were established to profit from investments in real estate and other ventures. According to the indictment, petitioners and co-defendant Matsukage engaged in a "community of business interests built upon mutual reliance, transactions and participation with each other to acquire, fund, maintain and expand the business interests of REFC, NORFOLK and NORFOLK's associated companies * * * by fraudulently taking, transferring and diverting monies held in the care and custody of REFC and in the care and custody of PACIFIC" (E.R. 42, 59-60).[1]

The indictment further alleged that in an effort to accomplish that goal petitioners, without explaining the true purposes to which the monies would be put, "caused large amounts of mortgage funds, collected by REFC from homeowners on behalf of their client mortgage companies, to be diverted to PACIFIC, NORFOLK, and NORFOLK's associated companies, in violation of mortgage-servicing contracts between REFC and the mortgage companies" (E.R. 49, 66). Instead of forwarding the mortgagors' payments to the mortgage companies on receipt, petitioners would use the funds to improve Pacific's deficit cash position or provide it with operating cash to support its various business enterprises.

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[1] "E.R." refers to the excerpt of record in the court of appeals.

The first 29 mail fraud counts (counts 2-30) alleged the mailings of mortgage payments by the victimized mortgagors to REFC in self-addressed envelopes. Most of the remaining mail fraud counts involved mailings allegedly designed by petitioners and their co-defendants to lull the victimized mortgage companies into believing that the monies collected were being properly applied to the payment of property taxes and to servicing the mortgages in accordance with the collection contracts.

Petitioners and some of their co-defendants moved to dismiss the indictment. Among other things, they argued that the indictment failed to demonstrate any causal relationship between the mailings, which they maintained were merely the result of preexisting contractual agreements, and the consummation of the fraudulent scheme. On July 2, 1985, a magistrate, relying on *Parr* v. *United States*, 363 U.S. 370 (1960), recommended dismissal of counts 2-30 (E.R. 385-394). In *Parr*, this Court held that tax statements and receipts routinely sent by a school district in accordance with preexisting legal requirements were not mailed in furtherance of a scheme to defraud. In this case, the magistrate wrote: "[T]he mailings described in Counts 2 through 30 were [as in *Parr*] sent out regularly and routinely as required by preexisting servicing contracts with REFC's various mortgagors. The checks ultimately alleged to have been sent in by the mortgagors would have been mailed even if the scheme to defraud had not existed" (E.R. 392-393).

The magistrate's recommendation was appealed to the district court, but on July 29, 1985, that court adopted the recommendation and dismissed counts 2-30 (E.R. 525). The next day, July 30, 1985, the district court began jury selection for trial on the remaining 45 counts, and the trial

began on July 31, 1985.[2] On August 20, 1985, the government filed a notice of appeal from the July 29 order dismissing counts 2-30. The trial on counts 1 and 31-74 proceeded while the appeal on counts 2-30 was pending.

On September 30, 1985, at the conclusion of the government's case-in-chief, the trial court granted a judgment of acquittal on counts 1 and 31-74 pursuant to Fed. R. Crim. P. 29(a). Addressing the conspiracy count, the court concluded (Pet. App. A36) that the evidence was insufficient to show "any agreement or conspiracy to commit either mail fraud or wire fraud against the United States, nor * * * that [petitioners], or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States" (*id.* at G4-G5). With respect to the remaining counts, the court held that the evidence was insufficient to demonstrate "that [petitioners], or either of them, were participants in any scheme or artifice to defraud, or any scheme or artifice to obtain money or property by false or fraudulent pretense alleged in the superseding indictment" (*id.* at G5-G6). Finally, the court held that no rational trier of fact could conclude beyond a reasonable doubt from all the evidence presented in the case that the mails were used for the purpose of executing any scheme or artifice to defraud (*id.* at G6).

2. The court of appeals reversed the trial judge's order dismissing counts 2-30. It reasoned that, by contrast with *Parr* v. *United States, supra,* the homeowners' duty to make payments to REFC stemmed not from an unrelated legal obligation imposed by the State, but from private servicing contracts between REFC and various mortgage

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[2] The trials of the defendants were bifurcated. Co-defendants Curtis J. Bernhardt and Carl J. Bernhardt have not yet been tried. Co-defendant Daniel R. Matsukage entered pleas of guilty to the conspiracy count, one mail fraud count, and one wire fraud count. Matsukage is now deceased.

companies. As parties to the contracts through their control of REFC, petitioners retained the power to control REFC's legal obligations under the contracts and, therefore, the payments by homeowners to REFC. That arrangement, which permitted petitioners to divert from the mortgage companies payments mailed by mortgagors, was a crucial element of the fraudulent scheme. Pet. App. A21-A29.

The court also rejected petitioners' argument that, as a result of the district court's judgment of acquittal on counts 1 and 31-74, the trial of counts 2-30 should be barred by the principles of collateral estoppel. Citing *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the court noted the requirement that, in order for collateral estoppel to apply, the issue must be one of ultimate fact that was necessarily determined against the government in a previous prosecution (Pet. App. A34). The court at the outset found it "not so clear" whether that requirement was met in this case (*ibid.*). The "sweeping and highly generalized" nature of the district court's factual determinations (*id.* at A38) forced the court of appeals to "speculate about the reasons for the acquittal" (*ibid.*). Ultimately, the court held, "[t]hat the government failed to prove that [petitioners] conspired (count 1) or that they hatched the scheme charged against them in counts other than 2 through 30, does not imply by analogy to [*Ashe*], that it was therefore not 'rationally conceivable' that they committed the offenses in the discrete counts of 2 through 30" (*id.* at A42 (quoting *Ashe*, 397 U.S. at 445)).

ARGUMENT

1. Relying on *Parr* v. *United States*, 363 U.S. 370 (1960), petitioners claim (Pet. 24-25) that, because the mailings alleged in counts 2-30 were made pursuant to a

legal obligation and were not themselves induced by misrepresentations, those counts were properly dismissed. The court of appeals properly rejected that contention.

In *Parr,* the defendants, who were members of the local school board, were required by law to assess and to collect taxes. Fulfilling these responsibilities by causing the mailings of letters, tax statements, checks, and receipts, they subsequently misappropriated some of the tax monies they received to their own use. The Court held that those mailings were not made for the purpose of executing a scheme to defraud alleged as a violation of 18 U.S.C. 1341, as the school board was merely causing the mailing of and receiving items that the law required to be mailed in any event.

By contrast with *Parr,* although the homeowners in this case were required to remit mortgage payments, their obligation to remit them to REFC did not stem from a preexisting, unrelated legal requirement but from private agreements between REFC and the mortgage companies that it serviced. Those agreements, the indictment alleged (E.R. 58, 68), enabled petitioners and their co-defendants to inject themselves into the collection process and, by sending preaddressed mortgage payment envelopes to homeowners, to divert the submission of mortgage payments to REFC. The agreements and the ensuing mailings were, therefore, crucial ingredients engineered by petitioners and their co-defendants for effectuating the fraudulent scheme alleged in the indictment. Cf. *United States* v. *Green,* 786 F.2d 247, 250 (7th Cir. 1986) (although mailing of accident report notices is required by law, the mailings were used with the specific intent to defraud recipients); *United States* v. *Mitchell,* 744 F.2d 701, 701 (9th Cir. 1984) (fraudulent scheme triggered legally required mailings necessary to obtain approval of condominium project); *United States* v. *Primrose,* 718

F.2d 1484, 1491 (10th Cir. 1983) (mailings of payment warrants, although required by law, necessary to effectuation of kickback scheme), cert. denied, 446 U.S. 974 (1984); *United States* v. *Bright,* 588 F.2d 504, 509 (5th Cir.) (mailing of creditor notices required by law triggered by fraudulent scheme), cert. denied, 440 U.S. 972 (1979).

It does not matter that the envelopes sent to the homeowners for the remittance of payments were addressed correctly, contained no misrepresentations, and were otherwise not misleading (Pet. 24-25). As the Court explained in *Parr,* 363 U.S. at 390, if the mailing was a step in the plot it is inconsequential that the mailings were innocent in themselves. Thus, the decision below does not conflict with *Parr,* as petitioners claim; rather, *Parr* supports the decision below.[3]

2. Petitioners also renew in this Court their contention (Pet. 14-23), which the court of appeals rejected, that even if counts 2-30 were improperly dismissed petitioners should escape prosecution on those counts by application of the principles of collateral estoppel. That fact-bound contention does not merit review and was properly rejected.

Although petitioners contend that there is a conflict between the decision below and the decisions of this Court and various courts of appeals, they cite no legal principle on which the court below differed with any other court. Petitioners simply disagree with the court below as to what issues were necessarily decided when the district court entered a judgment of acquittal on counts 1 and 31-74:

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[3] The disposition of this case need not await the Court's decision in *Schmuck* v. *United States,* cert. granted, No. 87-6431 (May 16, 1988). That case presents the different question whether mailings of motor vehicle title documents by innocent purchasers of used automobiles were sufficiently related to a fraud scheme involving the changing of the vehicles' odometer readings to support a mail fraud conviction.

petitioners contend that the district court necessarily determined that they did not participate in the scheme or artifice to defraud that forms the basis for counts 2-30, but the court of appeals concluded otherwise. The dispute between petitioners and the court of appeals as to what the district court necessarily determined is not the sort of issue that requires resolution by this Court.

Moreover, the judgment of the court of appeals is correct—for a reason that the court of appeals did not have to reach given its reading of the record—even if we assume, arguendo, that the issue of ultimate fact that petitioners now seek to foreclose is one that the district court necessarily determined against the government in the context of counts 1 and 31-74. Because bifurcation of the charges resulted from petitioners' partially successful motion to dismiss, and not from any effort by the government to prosecute the charges seriatim, the doctrine of collateral estoppel does not apply to this case at all.

The modern doctrine of collateral estoppel, as a component of the Double Jeopardy Clause, stems from *Ashe* v. *Swenson,* 397 U.S. 436 (1970). *Ashe,* unlike this case, involved a deliberate effort to prosecute the defendant in two separate proceedings. Although the defendant was charged in six separate counts with robbing six poker players, the State elected to try him first for robbing only one of the poker players, and then (after acquittal on that charge) for robbing another. See 397 U.S. at 457 (Brennan, J., concurring). In the present case, by contrast, the government had no wish to separate the trial of counts 2-30 from the trial of the other 45 counts. Rather, it was the actions of the defendants (in filing a motion to dismiss) and the trial court (in granting that motion as to counts 2-30) that led to the division of the indictment into two separate trials.

This Court's cases show that collateral estoppel does not apply to such a situation. In *Ohio* v. *Johnson,* 467 U.S. 493 (1984), the defendant, like petitioners here, had persuaded the trial court erroneously to dismiss certain charges, and he argued that collateral estoppel (stemming from the "implied acquittal" of those charges that the defendant argued was implicit in his conviction for lesser included offenses) barred the State from any further pursuit of the erroneously dismissed charges. This Court, in disagreeing, observed that, "in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the doctrine of collateral estoppel are inapplicable" (467 U.S. at 500 n.9). That principle directly controls this case.[4]

The United States Court of Appeals for the Fourth Circuit recently applied the principle stated in *Ohio* v. *Johnson* to a case very much like the present one. In *United States* v. *Ashley Transfer & Storage Co.,* No. 87-5153 (Oct. 3, 1988), the defendants were charged with

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[4] The principle stated in *Ohio* v. *Johnson* accords with this Court's broader double jeopardy jurisprudence, which generally holds the defendant and not the government responsible for successive prosecutions that result from the defendant's voluntary actions rather than any governmental effort to divide a case into successive prosecutions. See, *e.g., United States* v. *Jeffers,* 432 U.S. 137, 152 (1977) (plurality opinion) (footnote omitted) (Double Jeopardy Clause no bar to successive prosecutions for greater and lesser included offenses when defendant "elects to have the two offenses tried separately and persuades the trial court to honor his election"); *United States* v. *Scott,* 437 U.S. 82, 98-99 (1978) (government not barred by Double Jeopardy Clause from retrying defendant when defendant elects to seek midtrial dismissal on grounds unrelated to guilt or innocence); *United States* v. *Dinitz,* 424 U.S. 600, 606-607 (1976) (defendant may be retried after a mistrial, even if there was no "manifest necessity" for the mistrial, if the mistrial has been declared at the defendant's request); see also *Ricketts* v. *Adamson,* No. 86-6 (June 22, 1987), slip op. 9.

both Sherman Act conspiracy (15 U.S.C. 1) and conspiracy to defraud the United States in violation of 18 U.S.C. 371. Both crimes consisted of the same conspiratorial acts, but the charges were not multiplicitous because each statutory crime requires proof of a fact that the other does not. See generally *Blockburger* v. *United States,* 284 U.S. 299 (1932). The defendants nevertheless sought dismissal of one of the two charges on the ground of multiplicity, and during the trial the district court erroneously dismissed the conspiracy-to-defraud charge. The jury then acquitted the defendants on the Sherman Act charge. The court of appeals reversed and remanded for trial on the Section 371 count, rejecting the defendants' argument that the government was collaterally estopped from proving the conspiracy alleged in that count. Although the court agreed with the defendants that the jury had necessarily determined that they were not participants in the conspiracy alleged in both counts (slip op. 11-13), the court applied *United States* v. *Scott,* 437 U.S. 82, 98-99 (1978), and *Ohio* v. *Johnson, supra,* to determine that relitigation of that issue in the context of the as-yet-untried count was not barred (slip op. 14). "Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy" (*ibid.*).

The reasoning of the Fourth Circuit is, we submit, sound, and it provides a sufficient ground for permitting the trial of counts 2-30 notwithstanding the acquittal on counts 1 and 31-74. After all, counts 2-30 of the indictment have never been tried. As to those counts, then, petitioners "ha[ve] not been deprived of [their] valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Scott,* 437 U.S. at 100

(quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)); see also *Standefer* v. *United States*, 447 U.S. 10, 22-23, 25 (1980).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1988

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[5] The decisions on which petitioners rely (Pet. 18-22) in no way contradict this analysis. Only three of those cases even pertain to the doctrine of collateral estoppel, and all three cases involved government efforts to prosecute related charges seriatim rather than a single indictment that was carved up into two or more prosecutions as a result of actions by the defendants and the courts. See *Ashe* v. *Swenson*, *supra*; *United States* v. *Baugus*, 761 F.2d 506 (8th Cir. 1985); *United States* v. *Allen*, 539 F. Supp. 296 (C.D. Cal. 1982). All of the other cases that petitioners cite concern aspects of the Double Jeopardy Clause other than collateral estoppel. See *United States* v. *Scott*, *supra*; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States* v. *Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985); *United States* v. *Genser*, 710 F.2d 1426 (10th Cir. 1983); *Carter* v. *Estelle*, 677 F.2d 427 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983); *Sedgwick* v. *Superior Court*, 584 F.2d 1044 (D.C. Cir. 1978), cert. denied, 439 U.S. 1075 (1979). To the extent those cases are relevant at all, they support rather than undercut the analysis that we have advanced. See *Ashley Transfer*, slip op. 14 (relying on *Scott*); note 4, *supra*.

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